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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE GIUSEPPE MENDIOLA,

Defendant and Appellant.

G039622

(Super. Ct. No. 96HF0239)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed. Motion to augment record. Granted.

Law Offices of Mark S. Devore and Mark S. Devore for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobek, James H. Flaherty III and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

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I.

INTRODUCTION

Eddie Giuseppe Mendiola appeals from the order denying his motion to vacate the judgment and to withdraw his guilty plea (which he also refers to as a petition for writ of error *coram nobis*).¹ He contends that when he pleaded guilty in 1996 to charges of assault with a deadly weapon, possession of a controlled substance, and unauthorized possession of a syringe, he was not adequately advised of the immigration consequences of his plea as required by Penal Code section 1016.5. Mendiola acknowledges he signed and initialed a change of plea form properly advising him of the immigration consequences of his plea. He argues, however, the additional oral advisement given by the prosecutor when he entered his plea contradicted the plea form by only warning him the guilty plea could lead to denial of citizenship. Alternatively, Mendiola argues his trial counsel was ineffective by failing to warn him his guilty plea could lead to deportation or exclusion from admission to the United States.

We conclude Mendiola was adequately and properly advised of the immigration consequences of his plea because the change of plea form he signed and initialed contained the advisement required by Penal Code section 1016.5. The oral advisement did not contradict the written advisement, but was merely incomplete. A claim of ineffective assistance of counsel cannot be raised in a motion to vacate the

¹ It has been said “the terms ‘motion to vacate’ and ‘petition for writ of error *coram nobis*’ are often used interchangeably and the two procedures are similar in scope and effect.” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) “However, these motions typically would not meet the standards for writ of error *coram nobis* because they would not ask the court to evaluate newly discovered evidence. They would merely seek to have the court grant a statutory remedy for its own dereliction.” (*Id.* at p. 982, fn. 5; see also *People v. Carty* (2003) 110 Cal.App.4th 1518, 1521 [recognizing difference between a statutory motion to vacate judgment pursuant to Penal Code section 1016.5, subdivision (b) and a nonstatutory petition for writ of error *coram nobis*].) Our analysis of this case is the same whether we treat the appeal as from an order denying a motion to vacate judgment, or from an order denying a petition for writ of error *coram nobis*.

judgment under section 1016.5 or a petition for writ of error *coram nobis*. We therefore affirm.

II.

BACKGROUND

A. Guilty Plea and Conviction in 1996

Mendiola was born in Peru. He immigrated with his parents to the United States when he was two years old and became a permanent legal resident in 1989.

In July 1996, Mendiola was charged with one count of assault with a deadly weapon by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and one count of possession of an unauthorized needle and syringe (Bus. & Prof. Code, § 4149). It was alleged Mendiola committed the assault with the intent to cause great bodily injury on the victim (Pen. Code, § 12022.7) and the crime constituted a serious felony (*id.*, § 1192.7, subd. (c)(8)).

On July 30, 1996, Mendiola pleaded guilty to all counts and signed a change of plea form. As the factual basis for the plea, Mendiola wrote: “On 3-11-96 in Orange County I willfully and unlawfully aided and abetted an[d] assaulted C. Cornwell by means of force likely to produce great bodily injury, and possessed steroids and a syringe.”

On the plea form, Mendiola initialed the paragraph stating: “I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

The prosecutor took the oral waivers on the record on July 30, 1996. The prosecutor asked whether Mendiola had read, signed, and initialed the plea form. He replied, “[y]es.” The prosecutor asked whether Mendiola had discussed the change of

plea form with his attorney. He again replied, “[y]es,” and later replied, “[y]es” to the question whether he had sufficient time to discuss the form with his attorney. Mendiola confirmed that he was pleading guilty only because he was in fact guilty of the charges and for no other reason, and that the factual basis for his plea was true.

The prosecutor also asked Mendiola, “[i]f you’re not a citizen, do you realize that a felony conviction can affect your ability to be a United States citizen . . . ?” Mendiola answered, “[y]es.” The prosecutor did not mention the possibility of deportation or exclusion from admission to the United States.

The court placed Mendiola on three years’ formal probation, conditioned on spending 180 days in jail.

B. Motion to Vacate Judgment and Withdraw Guilty Plea

In August 2007, Mendiola filed a motion to vacate the judgment and withdraw his guilty plea. The motion asserted an immigration court had ordered Mendiola deported to Peru as a result of his criminal conviction. The motion sought to vacate the judgment on the ground Mendiola’s trial counsel was ineffective by not explaining the immigration consequences of his guilty plea.

In a declaration in support of the motion, Mendiola stated: “At no time prior to my guilty plea did my court-appointed attorney, Edward Eisler, ever mention the possibility I would be deported as a result of pleading guilty. In actuality, he advised me I had nothing to worry about regarding my voiced immigration concerns because not only was no weapon used in the offense, but also that I was merely an aider and abettor, and the steroid charge was only a misdemeanor. [¶] . . . [¶] . . . Had counsel explained to me that by taking the court’s six month offer I was guaranteeing my deportation back to Peru, a land of which I knew little about and had no family or friends, with no way of ever re-uniting with my large extended Orange County-based family network, I simply would have pushed forward to trial and/or urged counsel to try harder to seek a plea to a

non-deportable offense, particularly if it had been explained to me that based on my role merely as an aider and abettor, combined with my lack of prior record, I would most likely get probation after trial, or low term at worst, there is absolutely no way I would have taken the court's offer."

The trial court denied the motion to vacate the judgment because Mendiola had failed to establish he was not advised of the immigration consequences of his plea in compliance with Penal Code section 1016.5. As for ineffective assistance of counsel, the trial court stated, "if you take it as an incompetence of counsel issue there was [*sic*] anything deficient in what was done," but added, "competence of counsel can't be r[a]ised by writ of error coram nobis." The court stated, "[i]f there is an incompetence of counsel issue that has to be raised by way of a writ of habeas corpus."

Mendiola appealed from the order denying his motion and obtained a certificate of probable cause pursuant to Penal Code section 1237.5. An order denying a postjudgment order to vacate pursuant to section 1016.5 is an appealable order under section 1237, subdivision (b). (*People v. Totari* (2002) 28 Cal.4th 876, 887.)

III.

DISCUSSION

A. Advisement of Immigration Consequences of Plea

Penal Code section 1016.5, subdivision (a) states: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

If the trial court fails to give the advisements required by Penal Code section 1016.5, subdivision (a), the defendant can move to vacate the judgment and withdraw a guilty plea. (Pen. Code, § 1016.5, subd. (b); see *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 203-204.) “To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*People v. Totari, supra*, 28 Cal.4th 876, 884.) An order denying a motion to vacate the judgment under section 1016.5 is reviewed for abuse of discretion. (*People v. Superior Court (Zamudio), supra*, 23 Cal.4th at p. 192.)

The advisements required by Penal Code section 1016.5 may be given in a validly executed plea form rather than orally by the court. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522-523.) In that case, the defendant signed a change of plea form including the immigration advisements required by section 1016.5, but the trial court did not repeat those advisements orally. (*People v. Ramirez, supra*, 71 Cal.App.4th at p. 520.) The defendant moved to vacate the judgment on the ground the trial court failed to give the oral advisements. (*Id.* at p. 521.) The trial court denied the motion. (*Ibid.*) The appellate court reasoned the legislative purpose of section 1016.5 is met if “the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel.” (*People v. Ramirez, supra*, 71 Cal.App.4th at p. 522.) The court affirmed because the record contained a copy of the signed change of plea form, the change of plea form warned the defendant of all three possible immigration consequences “in precise statutory language,” the trial court had asked whether the defendant had

reviewed the form with his attorney, and the trial court had asked whether the form had been translated into Spanish and the defendant understood it. (*Id.* at p. 523.)

Mendiola acknowledges he signed and initialed the change of plea form containing the immigration advisements required by Penal Code section 1016.5. He acknowledged in court he had adequate opportunity to discuss the change of plea form with his attorney.

Mendiola argues he received “inadequate, confusing, and competing ‘advice’” because the prosecutor orally mentioned only the first possible immigration consequence of his plea—that a felony conviction could affect his ability to be a United States citizen. The oral advisement given by the prosecutor did not contradict the immigration advisement contained in the change of plea form, but was merely incomplete. The immigration advisement in the change of plea form was complete, and fully met the requirements of Penal Code section 1016.5. Mendiola initialed the immigration advisement in the change of plea form and stated at the plea hearing he had discussed the change of plea form with his attorney.

Thus, we conclude, Mendiola was properly advised of the immigration consequences of his change of plea. The trial court did not abuse its discretion in denying his motion to vacate the judgment.

B. Ineffective Assistance of Counsel

Mendiola contends his trial counsel was ineffective for not informing him a guilty plea could result in deportation. However, a claim of ineffective assistance of counsel must be raised by a petition for writ of habeas corpus. (*In re Resendiz* (2001) 25 Cal.4th 230, 237, fn. 2; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1477; see also *People v. Chien* (2008) 159 Cal.App.4th 1283, 1290 [ineffective assistance of counsel may not be raised in motion to vacate judgment under Penal Code section 1016.5];

People v. Ibanez (1999) 76 Cal.App.4th 537, 546, fn. 13 [ineffective assistance of counsel may not be raised in petition for writ of error *coram nobis*].)

We decline to address Mendiola's ineffective assistance of counsel claim by treating the motion to vacate the judgment as a petition for writ of habeas corpus. The trial court should have the first opportunity to address a petition for writ of habeas corpus asserting ineffective assistance of counsel so it can decide whether to issue an order to show cause and hold an evidentiary hearing. (Cal. Rules of Court, rule 4.551(c) & (f); *In re Resendiz, supra*, 25 Cal.4th 230 [ineffective assistance of counsel claim raised in habeas corpus petition].) Although the trial court here commented it saw nothing "deficient in what was done," it made no findings on Mendiola's claim of ineffective assistance of counsel, and stated such a claim must be raised by a petition for writ of habeas corpus.

C. Motion to Augment Record

Mendiola moved to augment the record to include documents from the Immigration and Naturalization Service and from the Board of Immigration Appeals showing he faces imminent deportation based on his 1996 conviction. Mendiola argues these additional documents counter the Attorney General's assertion he failed to prove there was more than a remote possibility his conviction may result in immigration consequences. The Attorney General filed no written opposition to the motion. At oral argument, the Attorney General made an untimely objection to the motion to augment.

We grant the motion to augment the record, but deny Mendiola's request for supplemental briefing. Because we have concluded Mendiola was advised of the immigration consequences of his plea by initialing and signing the change of plea form, we do not address whether he faced more than a remote possibility a conviction would have at least one of the specified adverse immigration consequences.

DISPOSITION

The postjudgment order denying the motion to vacate the judgment and withdraw the guilty plea is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.